No. 82-1509

IN THE

Supreme Court of the United States

October Term, 1982

DELEET MERCHANDISING CORP.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented.

Does the Government have the right in perpetuity to seek to assess tax deficiency and penalties, or does the filing of a complete and accurate amended income tax return after the taxpayer filed an original tax return which, it is alleged, fraudulently omitted certain taxable income, start the running of the three-year Statute of Limitations under Section 6501(a) of the Internal Revenue Code?

With the singular exception of the divided Third Circuit every other Federal court which has entertained the question raised has held that the three year Statute of Limitations is applicable.

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TABLE OF AUTHORITIES.

CASES CITED:

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petition for a Writ of Certiorari.

Petitioner Deleet Merchandising Corp. ("Deleet"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinion Below.

The Opinion of the Court of Appeals for the Third Circuit (App. *infra*, p. 1a) is reported at 693 F. 2d 298 (3rd

Cir. 1982). The Opinion of the United States District Court for the District of New Jersey (App. p. 1d) is reported at 535 F. Supp. 402 (1982).

Jurisdiction.

The judgment of the Court of Appeals for the Third Circuit (App. p. 1b) was entered on November 29, 1982. A petition for rehearing and for rehearing *en banc* was denied on December 23, 1982 (App. p. 1c). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statute Involved.

Section 6501 of the Internal Revenue Code of 1954, as amended ("the Code"), in pertinent part provides:

> §6501 (a) GENERAL RULE—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * * and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
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> * * *
>
> (c) EXCEPTIONS—
>
> (1) FALSE RETURN—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) NO RETURN—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Statement of the Case.

A. Procedural History

On January 4, 1980, the petitioner, Deleet Merchandising Corp. (the "Taxpayer") commenced this action by filing a complaint in the United States District Court for the District of New Jersey. The complaint alleged that the Internal Revenue Service (the "Service") erroneously and illegally assessed the Taxpayer for corporate income taxes and penalties totalling $38,604.00 for 1967 and $75,589.83 for 1968, and demanded judgment in those amounts, with interest as provided by law. On March 21, 1980, the Government filed its answer, which denied that the assessments were erroneous or illegal.

On December 14, 1981, the Taxpayer moved for Summary Judgment, on the ground that the assessment of tax by the Service was time barred under the three year limitation in Section 6501(a) of the Code. The Government opposed on the ground that since the original returns were

allegedly fraudulent[1] the Government is entitled to assess the Taxpayer indefinitely, under Section 6501(c)(1) of the Code.

By opinion and order dated and entered December 22, 1981, Chief Judge Clarkson Fisher granted Summary Judgment in favor of the Taxpayer, holding that the Taxpayer's filing in 1973 of concededly complete, accurate and non-fraudulent amended income tax returns for the tax years 1967 and 1968 commenced the running of the three-year limitations period under Section 6501(a) of the Code and, therefore, the assessment of a tax deficiency and penalties in 1979, more than six years later, was time barred.

On February 18, 1982, the Government filed its Notice of Appeal to the United States Court of Appeals for the Third Circuit. On November 29, 1982, the Court of Appeals (Circuit Judge James Hunter III dissenting), disregarding the opinions of the United States Courts of Appeal for the Tenth and Second Circuits and the full United States Tax Court[2] concluded that the Government had a right in perpetuity to assess the taxpayer under Section 6501(c)(1) of the Code. Petition for rehearing *en banc* was denied by the Court of Appeals on December 23, 1982, and this Petition followed.

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[1] The Government's allegation that the original returns were fraudulent has never been adjudicated. The District Court noted that the fraudulent or nonfraudulent nature of those returns did not present a genuine issue of fact, and had no bearing on the outcome of the motion.

[2] *Dowell v. Commissioner*, 614 F. 2d 1263 (10th Cir. 1980); *Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without published opinion* (2nd Cir. No. 816246 April 15, 1982); *Klemp v. Commissioner*, 77 T. C. 201 (1981); *Espinoza v. Commissioner*, 78 T. C. 412 (1982); *Kramer v. Commissioner*, 44 T. C. M. 42 (1982); *Elliot Liroff v. Commissioner*, 44 T. C. M. 42 (1982); *Derfel v. Commissioner*, 44 T. C. M. 47 (1982); *Nesmith v. Commissioner*, 42 T. C. M. 1269 (1981).

B. Relevant Facts

There are no facts in dispute in connection with this matter.[3] It is agreed that the Taxpayer timely filed its corporation income tax returns for the years ending December 31, 1967 and December 31, 1968 (the "original returns") and paid the taxes due on these returns. Further, it is undisputed that on August 9, 1973 the Taxpayer, which was not the subject of any criminal or civil government investigation, voluntarily filed amended tax returns for the tax years 1967 and 1968 (the "amended returns"). The amended returns were accepted for filing by the government, who conceded them to be accurate. Pursuant to its amended returns the Taxpayer sought a refund of $6,206.00 shown to be due on the 1967 amended return and paid $36,314.01 due to the Service as additional taxes on the 1968 amended return.

On December 14, 1979, more than six years after the amended returns were filed, the Service issued a Notice of Deficiency, based upon the information contained in Taxpayer's amended return. The Notice of Deficiency, *inter alia*, disallowed Taxpayer's refund claim for 1967, and assessed a deficiency of $25,248.00 and penalties of $13,356.00 for 1967, and assessed a deficiency of $36,314.01 and penalties of $39,275.82 for 1968. On or about December 27, 1979, the Taxpayer paid the deficiencies and penalties assessed. On January 4, 1980, the Taxpayer filed its complaint in the United States District Court for the District of New Jersey, seeking judgment for the amounts improperly, erroneously and illegally assessed by the Service.

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[3] The Government submitted no affidavits or documentation to the District Court in opposition to the Taxpayer's motion for Summary Judgment. Thus, all facts in the Taxpayer's affidavit submitted below were accepted as stated.

Reason for Granting a Writ of Certiorari

I.

The decision below is in direct conflict with the decisions of the Courts of Appeals for the Tenth Circuit and the Second Circuit and the United States Tax Court.

There exists at present a direct conflict between the decisions rendered by the Courts of Appeals for the Tenth Circuit and the Second Circuit and the Tax Court of the United States[4] and the decision rendered by the Court of Appeals for the Third Circuit. On appeal by the Government two other Circuit Courts (the Fifth Circuit and the Ninth Circuit) are now considering cases involving the same issues of law.[5] The conflict between the Circuit Courts will therefore be further heightened by the decisions of two other Circuit Courts, which will either align themselves with the view of the majority, rejecting the position expressed by the Third Circuit, or join that minority position. Therefore, if this Petition is not granted by the Court, the Court will certainly have to consider numerous like petitions filed by the Government or the Taxpayer each time this important issue is decided by one of the Circuit Courts of Appeals.

Moreover, the issue of the applicability of the Statute of Limitations is of such significance to the uniform application and enforcement of the Federal tax laws that the Government has informally advised the attorneys for the

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[4] See cases cited in footnote 2 *supra* at p. 4.

[5] *Klemp v. Commissioner*, 77 T. C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir.); *Nesmith v. Commissioner*, 42 T. C. M. 1269 (1981), *appeal docketed*. No. 82-4162 (5th Cir.).

Petitioner that they will not oppose the instant petition and may in all likelihood join in the request for the granting of a Writ of Certiorari. Petitioner submits that the substantial interest of the Government, as well as that of the taxpayers, in having this issue resolved by this Court is ample evidence that the most economic use of judicial resources would be the granting of the instant application. A timely decision by this Court will eliminate the barrage of appeals which would doubtless otherwise be filed in the Tax Court and the various Circuit Courts of Appeals, as well as eliminate the filing with this Court of numerous Certiorari petitions by either a concerned Government or interested taxpayers.

The basic conflict between the majority view and that of the Third Circuit arises from the majority's conclusion that there is no basis for drawing a legal distinction between those cases involving a fraudulent failure to file a tax return [Section 6501(c)(3)] and those involving filing a false tax return [Section 6501(c)(1)]. The majority views the filing of a non-fraudulent amended return subsequent to the filing of a false and fraudulent original return in exactly the same light as filing a late original return following the fraudulent failure to file any return at all; to wit, the filing of the amended return commences the running of the three year Statute of Limitations provided in Section 6501(a) of the Code. The majority position is based upon the decision in *Bennett v. Commissioner,* 30 T. C. 114 (1958), acq. 1958-2 C. B. 3, and this Court's decision in *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172 (1934) as to what constitutes the filing of a proper tax return.

The minority view, expressed by a divided Third Circuit, rejected the reasoning of the majority and concluded—without reference to any legislative history—that Congress intended to draw a distinction between a fraudulent failure to file a return and the filing of a false

return. It holds that once a fraudulent tax return has been filed, the Statute of Limitations is tolled forever and no subsequent act, by either the Government or the taxpayer, can deprive the Government of its perpetual right to assess civil penalties.

The opinions of the majority of the Circuit Courts and the Tax Court are on firmer legal ground and are better reasoned than the opinion of the Third Circuit, as is pointed out in the dissenting opinion filed by Judge Hunter of the Third Circuit. Moreover, by creating a clear disparity of treatment between the fraudulent failure to file and the filing of a fraudulent tax return, the Third Circuit has not only elevated one form of tax fraud over the other, but in doing so, has ignored this Court's opinion in *Zellerbach Paper Company v. Helvering, supra*; the governing decision of *Bennett v. Commissioner, supra*, and the Service's stated view of the applicable law, as manifested by its own Revenue Ruling issued subsequent to *Bennett*

The Tax Court in *Bennett* held that where a taxpayer fails to file a tax return, he is open to assessment at literally any time under Section 6501(c) (3). However, once that failure is corrected by the filing of a proper and accurate return, the provisions of Section 6501(a) supersede the provisions of Section 6501(c) (3) and the assessment period is thereby limited to three years from the date of the filing of the proper and accurate return. Following its acquiescence in *Bennett*, the Service issued a Revenue Ruling (Rev. Rul. 79-178 I.R.B. 1979-23, 16) stating that:

> "The tax cannot be assessed at any time under Section 6501(c) of the Code, but must be assessed within the three-year period of limitations provided in Section 6501(a) (June 1, 1979)."

In its ruling the Service refers to Section 6501(c) *in toto* without reference to its various sub-sections. Thus, in promulgating its Ruling, the Service made no attempt to distinguish between the fraudulent failure to file [Section 6501(c) (3)] and the filing of a fraudulent return [Section 6501(c) (1)].

The majority of the Federal Courts which have considered this issue have also rejected creation of an artificial distinction between these two Sections of the Code. These Courts have held that as the filing of a late return begins the running of the limitation period where the taxpayer has fraudulently failed to file, so the filing of a proper and accurate amended return begins the running of the limitation period with respect to the taxpayer who previously filed a fraudulent return. In reaching their conclusions, the majority have relied on this Court's opinion in *Zellerbach Paper Company v. Helvering, supra,* which held that a proper tax return must "evidence an honest and genuine effort at reporting the information and comply with the law." A false and fraudulent return does not satisfy such a disclosure requirement and will not suffice to trigger the three year period of limitations set forth in Section 6501(a) of the Code. The filing of a complete and accurate amended return begins the running of the three-year Statute of Limitations set forth in Section 6501(a), for it does represent an "honest and genuine effort" on the part of the taxpayer to comply with the legal requirements of the Code, and it must be viewed as a "return" under all applicable Sections of the Code.

The Third Circuit decision, disregarding the prior decisions of the Second and Tenth Circuits, and drawing a distinction as to the applicability of the three-year Statute of Limitations between those cases involving fraudulent

failure to file and those involving fraudulent filing, is erroneous and contrary to public policy. First, by giving preferential treatment to the fraudulent non-filer it clearly elevates one form of tax fraud over another. Moreover, it discourages those who may have originally filed a false return from coming forth, confessing their error and filing a proper return.

It has often been stated that the American system of taxation depends upon self-assessment by informing the Government of accurate tax liability. *See,* 9 Mertens, *Law of Federal Income Taxation,* §49.02; *Lucia v. The United States,* 474 F. 2d 565 (5th Cir. 1973). Under the erroneous holding of the Third Circuit proper self-assessment is discouraged.

The potential ramifications of the Third Circuit holding can be clarified by use of a hypothetical situation:

New management of a corporation determines that prior management, had, some six years before, filed a fraudulent tax return. Under the impact of the Third Circuit decision, new management could conclude that it would not be in the best interests of the corporation to consider rectifying the situation by filing a complete and accurate amended tax return, for with the six year Statute of Limitations on Criminal Tax Fraud having run (Section 6531 of the Code), beyond its willingness and desire to file a proper and accurate tax return, the management must concern itself with the question of exposing the corporation to the imposition of additional tax assessments and civil penalties. Certainly the filing of such an amended tax return by the corporation would alert the Service to the fact that the first return was improper. Thereafter, if deprived of the benefit of any Statute of Limitations, the corporation's voluntary filing of an accurate amended

return would subject it to the pleasure of the Service, which could impose tax assessments and civil penalties upon the corporation at any time it so desired, until the last day of the corporation's existence.

Acceptance of such a policy discourages the conscientious and repentant taxpayer who might desire to correct errors made in the original return from coming forth and supplying the government with the proper information by way of an amended return. It thereby creates an obstacle to honesty in dealing with the Government. *See, National Refining Company of Ohio v. Commissioner,* 1 B.T.A. 236, 241 (1924), nonacq., IV-1 C.B.4. Thus, the erroneous ruling by the Third Circuit must be viewed as generally detrimental to the overall policies applicable to tax collection in this country.

The conflict inevitably ensuing from a divided Third Circuit's rejection of the prior decisions of the Tenth and Second Circuits and the full Tax Court will result—and in this case has already resulted—in the creation of a substantial disparity with respect to the application and enforcement of the Federal tax laws. The impact of this disparity of application can best be demonstrated by a simple review of the effect of the Third Circuit's decision on the circumstances in this case, which is, in fact, a microcosm of the effect this conflict between the Circuit Courts of Appeals will have on all taxpayers.

The Petitioner, Deleet Merchandising Corp., as a corporation brought its claims against the Commissioner of Internal Revenue in the U.S. District Court. Companion cases were filed in the Tax Court by the former and present officers of Deleet, and relief similar to that granted

the individual taxpayers by the Tax Court.[6] Based upon the opinion in the Third Circuit reversing the holding of the U.S. District Court as to the applicability of the Statute of Limitations, the Government made motions in the Tax Court to vacate the prior Tax Court judgments granted to the individual taxpayers. After filing their motions in all of the cases, the Government, realizing that one of the taxpayers resided in the State of New York and thus within the jurisdiction of the Second Circuit and not the Third Circuit, withdrew its motion to vacate the prior judgment with respect to that taxpayer.[7] Therefore, this very case presents a situation where one taxpayer, a former officer of the Petitioning corporation, is protected by the Second Circuit ruling that the tax must be assessed within the three-year Statute of Limitations provided in Section 6501(a); while three other taxpayers, also officers of the Petitioner Deleet, whose tax liability arose from the identical factual circumstances as the New York taxpayer, are deprived of the protection of the application of the Statute of Limitations merely by reason of the fact taht they live within the jurisdiction of the Third Circuit. Petitioner suggests that this harsh and inequitable result is not in keeping with the concept of "equal protection" which our judicial system is intended to afford to all citizens and taxpayers of this Country.

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[6] *Kramer v. Commissioner*, 44 T.C.M. 42 (1982); *Elliot Liroff v. Commissioner*, 44 T.C.M. 42 (1982); *Derfel v. Commissioner*, 44 T.C.M. 45 (1982); *Richard Liroff v. Commissioner*, 44 T.C.M. 47 (1982).

[7] *Elliot Liroff v. Commissioner*, Doc. #3219-80—Order dated February 4, 1983 (see, App. p. 1f).

II.

The decision below presents a substantial question of statutory interpretation.

A divided Third Circuit, in reaching its decision, rejected the interpretation of the statutes by the other Federal Circuit Courts as well as all prior judicial statements of Congressional intent in the area. The Court affirmatively found that Congress clearly intended to draw a distinction between the "fraudulent failure to file" [Section 6501(c)(3)] and the "filing of a fraudulent tax return" [Section 6501(c)(1)]; this Congressional distinction, as stated the Third Circuit, without citing any supporting authority or legislative history, permits an open-ended assessment of civil penalties notwithstanding the subsequent filing of a complete and accurate amended return.

Petitioner submits that the Third Circuit's strained reading of the statute is contrary to this Court's consistent holding that, in all cases of statutory construction, it is the judiciary's task to interpret the words of the statute in light of the purposes Congress has sought to serve. *Chapman v. Houston Welfare Rights Org.*, 441 U. S. 600, 608 (1979). Furthermore, said interpretation is in direct conflict with available legislative history.

Congressional intent that the assessment and collection of Federal income tax be carried out within a period of limitations, measured from the date of the filing of the income tax return, is expressly set forth in the statute [Section 6501(a)]. Moreover, it was established long ago that,

> "Statutes of limitation are founded on sound policy. They are statutes of repose and should not

> be evaded by a forced construction." *Pillow v. Roberts,* 13 How. 472, 477 (1851). *See also Clementson v. Williams,* 8 Cranch 72, 74 (1814).

In the Federal tax area, there has been no manifestation of Congressional intent of a policy in favor of an unlimited assessment period. *Bennett v. Commissioner,* 30 T. C. 114, 123-24 (1958). Once a taxpayer has furnished the Government with a complete and accurate return, Congress has given the Government a definite period within which to determine any errors; after that period the taxpayer is assured his tax liability cannot be reopened. *Germantown Trust Co. v. Commissioner,* 309 U. S. 304 (1940); *Mabel Elevator Co. v. Commissioner,* 2 B.T.A. 517, 519 (1925), acq., VI-1 C.B. 4.

> "These matters Congress has considered and in its legislative wisdom it has enacted the limitation period at the price of losing the tax." *Sugar Creek Coal & Mining Co. v. Commissioner,* 31 B.T.A. 344, 347 (1934), acq., XIV-1 C.B. 20.

The only instances in which the limitations period is lengthened or altogether suspended are those in which the Government has not received within the three year period the information it requires to investigate tax liabilities. 26 U.S.C. §§ 6501(c) and 6501(e); *see United States v. National Tank & Export Co.,* 45 F. 2d 1005 (5th Cir. 1930), *cert. denied,* 283 U. S. 839 (1931); *cf. The Colony, Inc. v. Commissioner,* 357 U. S. 28 (1958). *See also* "Statutes of Limitation in Tax Fraud: Basic Policies and Circumvention" 71 Dickinson L. Rev. 1 (1966). Once the Government does receive the information it requires, *i.e.*, once a

proper return is filed, there is no reason why its investigation period should thereafter be unlimited. For an open-ended Statute of Limitations cannot be said to serve Congress' intent or the purpose of the society it is intended to serve.[8]

Moreover, the statutory provisions regarding the filing of a fraudulent return and the failure to file a return are identical in language and have confluent legislative histories; therefore, they should be given identical judicial interpretations. The Revenue Act of 1918 provided an unlimited assessment period for fraudulent returns. The Revenue Act of 1921 added failure to file cases to those covered by the unlimited assessment provision, so that both the fraudulent filing and the fraudulent failure to file circumstances were addressed within the same subsection, Section 250(d). *See* 10 Mertens, *Law of Federal Income Taxation* (1976 ed.), §§ 57.09 and 57.10; *Seidman's Legislative History of Federal Income Tax Laws, 1938-1961*, pp. 880-882. Both circumstances continued to be treated within a single subsection, Section 276(a), in the

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[8]In construing the statute the Third Circuit also accepted the Service's erroneous contention that the Internal Revenue Code provides no authority for the filing of amended returns. This ostrich-like position ignores the fact that the filing of amended returns is a well-recognized, commonplace practice encouraged by the Commissioner. *See, Brookwalter v. Mayer*, 345 F. 2d 476, 480 (8th Cir. 1965). In fact, forms for an "Amended U.S. Corporate Income Tax Return" are printed by the Commissioner as Form 1120X. The purpose of Form 1120X as stated thereon is "to correct corporate income tax returns, Form 1120, as you originally filed it or as it was later adjusted by an amended return, claim for refund or an exemption." Form 1120X is to be filed "only after you have filed your original return. Generally, you must file Form 1120X within three years after the date the original return was due or three years after the date you filed it, whichever was later." General Instructions to Form 1120X; *See* Treas. Reg. §301.6402-3(a) (1) and (2); *See also* Treas. Reg. §1.6091-2(e).

Internal Revenue Code of 1939. When the Internal Revenue Code of 1954 was adopted, the Congressional draftsmen, without explanation, placed the two circumstances, unchanged, in separate subsections, Sections 6501(c) (1) and 6501(c) (3). The legislative history provides no hint of any intention to differentiate between those who fraudulently fail to file returns and those who file fraudulent returns. Indeed, both subsections, though set apart, still provide identical treatment: "[t]he tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

A unified and consistent interpretation of this Federal statute should be promulgated. Therefore, this application should be granted by this Court, to provide a speedy resolution of the conflict of statutory interpretations regarding the extent of the application of Section 6501(a) which presently exists between the Circuit Courts of Appeals.

III.

The decision below created an inherently inequitable situation with national implications affecting the public interest.

The issue presented in this Petition relates to the interpretation of a statute of national importance—the Federal tax law—which should be uniformly applied. The decision of a divided Third Circuit to totally disregard the prior decisions of its sister Circuit Courts and that of the full Tax Court, has created a situation where taxpayers are subject to the imposition of substantial adverse tax consequence based solely upon their geographical residence within the United States.

As heretofore noted, as a result of the conflict between the Circuits, in the instant case taxpaying officers of the Petitioner Deleet will themselves receive different and conflicting treatment under the Federal tax laws: One taxpayer will be protected, by virtue of the three-year Statute of Limitations, from any attempt by the Internal Revenue Service to impose any additional assessments and civil penalties on him, while the other taxpaying officers will be subject to additional assessments and penalties, notwithstanding the fact that the Government waited over six years after a proper and accurate return was filed to seek such assessments and penalties. This disparity of treatment results solely from the conflicting decisions of the Second and Third Circuit Courts, which has caused the Federal tax laws to be applied based upon a determination as to which bank of the Hudson River the taxpayer resides—the taxpayer living on the New York side of the Hudson receiving more favorable treatment than the taxpayers residing on the New Jersey side.

This disparity of treatment, although highlighted by the facts herein, is not limited to the case at bar, but rather is applicable to all taxpayers who reside within the jurisdictional boundaries of the Third Circuit contrasted with those who live in the Tenth and Second Circuits and beyond. Moreover, how this aspect of Federal tax law will be applied to those taxpayers residing within the Fifth and Ninth Circuits is still uncertain, for in those jurisdictions the cases which have been argued to those Appellate Courts have not yet been decided.

The applicability of the civil Statute of Limitations in the area of Federal tax law should not be determined solely by the geographical location of the taxpayer's place of residence. Nor should the application of the Statute of

Limitations vary from tax year to tax year, merely by reason of the fact that the taxpayer may have moved from one area of the country to another. However, unless this Court considers and rules on this matter such inequities in the administration of Federal tax law will continue unabated.

The absence of an orderly and equitable administration of Federal tax law is not in keeping with the professed goals of this Nation's Judicial System, which prides itself on affording "equal protection under the law" to all of its citizens and taxpayers. Petitioner therefore submits that this Court should grant this petition for a Writ of Certiorari so that all Federal taxpayers are guaranteed continued uniformity of application of the Federal tax laws.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted. The Court may consider the error below so clear as to justify reversal without the filing of further briefs and oral argument.

Respectfully submitted,

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APPENDIX A—Opinion of the Third Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-3033 and 82-5171

ERNEST BADARACCO, SR. and ROSE BADARACCO,
ERNEST BADARACCO, JR. and
BARBARA BADARACCO,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant in No. 81-3033

ON APPEAL FROM THE UNITED STATES TAX COURT

Docket Entries Nos. 1700-78 and 1701-78

DELEET MERCHANDISING CORP.

v.

UNITED STATES OF AMERICA,
Appellant in No. 82-5171

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-00026

Argued September 16, 1982

Before: ADAMS, HUNTER and BECKER, *Circuit Judges*

(Filed November 29, 1982)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*,

These two appeals[1] concern the effect of filing nonfraudulent, amended income tax returns, subsequent to the filing of fraudulent original returns, on the statute of limitations provisions of 26 U.S.C. §6501.[2]

I.

The facts in each proceeding are undisputed.[3] In the first case, Ernest Badaracco, Sr. and Ernest Badaracco, Jr. were equal partners in an electrical contracting business, Badaracco Brothers and Company. They

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1. These cases were not consolidated. They were, however, argued together and contain no relevant differences of fact. We will, therefore, discuss them in a single opinion.

2. 26 U.S.C. §6501 provides in relevant part:

> (a) Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
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> . . .
>
> (c) Exceptions.
>
> (1) False return. In the case of a false return or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

3. Delcet Merchandising Corporation denies any fraud on its part in the preparation of its income tax returns. The district court, however, assumed that the original returns were fraudulent for the purposes of the summary judgment motion, and we must make the same assumption in deciding the appeal from that decision.

filed individual and partnership returns for the years 1965 to 1969, which fraudulently understated their taxable income. After federal grand juries subpoenaed the partnership's books and records, the taxpayers, on August 17, 1971, filed amended returns for each of the years in question. Three months later, on November 17, 1971, the Badaraccos were indicted on fifteen counts under 26 U.S.C. §7206(1) for filing false and fraudulent income tax returns for the years 1965 to 1969. They each entered a plea of guilty to the charge of filing a false and fraudulent partnership tax return for 1967, and the district court entered a judgment of conviction on June 6, 1973. *United States v. Badaracco*, (N.J. Crim. No. 766-71). The remaining counts of the indictment were dismissed. Four and one-half years after the conviction, the Commissioner of Internal Revenue issued deficiency notices for each of the five years in question. The Badaraccos asserted that the Commissioner's action was time-barred by 26 U.S.C. §6501(a), because more than three years had passed since the filing of their non-fraudulent, amended returns. The Tax Court agreed, and the Commissioner appealed to this Court.

In the second case, Deleet Merchandising Corporation ("Deleet") filed timely corporate income tax returns for the years 1967 and 1968. Amended returns for these years were then filed on August 9, 1973. Following lengthy criminal and civil investigations, the Internal Revenue Service ("I.R.S.") issued a notice of deficiency to Deleet on December 14, 1979 for the years 1967 and 1968. The taxpayer paid the deficiencies and penalties assessed on or about December 27, 1979, and then filed a complaint in district court to recover those monies. On December 14, 1981, Deleet moved for summary judgment on the ground that even if the original returns had been fraudulent, the deficiencies and penalties could not be assessed more than three years after the filing of a non-fraudulent amended return. The district court granted the motion and the Commissioner appealed.

II.

To support their claims that the three year statute of limitations has run, the taxpayers rely principally on *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and the cases which have followed it. *Britton v. U.S.*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion* (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), on appeal (9th Cir. No. 81-7744); *see also, Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Deyel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981); *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*). The *Dowell* court held that a fraudulent return was in effect no return at all, because the taxpayer had failed to evince "an honest and genuine effort to satisfy the law" within the meaning of *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), and *John D. Alkire Inv. Co. v. Nicholas*, 114 F.2d 607 (10th Cir. 1940).[4] It then reasoned that the fil-

4. *Zellerbach Paper* presented essentially the opposite of the problem posed by this case. A taxpayer filed a non-fraudulent return. Subsequent to the filing of that return, Congress passed the Revenue Act of 1921 which applied retroactively and had a *de minimis* effect on the tax liability of the company. After the limitations period had run, the government attempted to assess large deficiencies, on grounds unrelated to the 1921 Act, on the theory that the failure to file an amended return rendered the original return a nullity and tolled the statute of limitations. The Supreme Court rejected the argument, noting that where a return purported to be a return and evinced an honest and genuine endeavor to satisfy the law it would not be treated as a nullity because of inaccuracies or omissions. "Supplement and correction in such circumstances *will not take* from a taxpayer, *free from personal fault*, the protection of a term of limitation *already running for his benefit*." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934) (emphasis added). Nothing in the opinion suggests that a culpable taxpayer, who files a fraudulent return with the intent to evade tax, renders the original fraudulent return a nullity for the purpose of the statute of limitations by filing an amended return.

ing of a non-fraudulent, amended return subsequent to the filing of a false and fraudulent original return would have exactly the same effect as the filing of a late original return following the fraudulent failure to file any return at all. Because in *Bennett v. Commissioner*, 30 T.C. 114 (1958), *acq.* 1958-2, C.B. 3, the Tax Court had held that the late filing of a non-fraudulent return began the running of the general three year statute of limitations, the court in *Dowell* concluded that the filing of a non-fraudulent amended return after the filing of an original fraudulent return also started the running of the limitations period. We disagree.

Section 6501(c)(1) is clear on its face. It permits the Commissioner "[i]n the case of a false or fraudulent return with the intent to evade tax" to assess the tax or proceed in court without an assessment "*at any time*." 26 U.S.C. §6501(c)(1) (emphasis added). There is nothing in the statute, its legislative history, or the regulations to indicate that the subsequent filing of an amended return has any effect on this provision.[5]

Original returns which are filed late, in contrast, are dealt with explicitly in section 6501(a):

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed

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5. We note that the treatment of amended returns is a matter of internal administration, and solely within the discretion of the Commissioner. Miskovsky v. U.S., 414 F.2d 954, 955 (3d Cir. 1969). Neither the Internal Revenue Code nor the Treasury Regulations make any provision for the acceptance of an amended return in place of the original return previously filed. Koch v. Alexander, 561 F.2d 1115, 1117 (4th Cir. 1977); Kearney v. A'Hearn, 210 F. Supp. 10, 16-17 (S.D.N.Y. 1962), *aff'd per curiam*, 309 F.2d 487 (2d Cir. 1962). *See also* Kaltreider Constr., Inc. v. United States, 303 F.2d 366, 368 (3d Cir. 1962), *cert. denied*, 371 U.S. 877 (1962) (three year period of limitation for filing refund claim is not altered by the filing of an amended return).

(whether or not such return was filed on or after the date prescribed).

(Emphasis added.) There is no comparable language relating to fraudulent original returns, and we have no reason to believe that Congress acted inadvertently when it treated the two situations differently.[6]

III.

Section 6501, as the district court noted in *Britton v. United States*, "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiences." 532 F. Supp. at 278. We find no evidence that Congress struck that balance in such a way as to permit the Commissioner only three years to proceed against persons who filed fraudulent original returns and later submitted non-fraudulent amended returns.

According to the taxpayers, if a citizen has alerted the government to problems with an original tax return by filing an amended return, there is no need to permit the Commissioner unlimited time to assess taxes and deficiencies; furthermore, treating repentent and unrepentent tax evaders alike under section 6501(c)(1) removes all incentive for taxpayers to amend their fraudulent returns. They also assert that to allow the I.R.S. unlimited time to dangle the threat of prosecution, like the sword of Damocles, over the heads of persons who have filed

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6. The court in *Dowell* declared that section 6501(c)(1) and section 6501(c)(3) are *in pari materia* and should, therefore, be construed consistently with one another. We agree with that statement but reach a different conclusion, because we believe that Congress provided a clear indication in section 6501(a) that it did intend "statute of limitations treatment to differ between taxpayers who filed fraudulent returns, and those who fraudulently failed to file." Dowell v. Commissioner, 614 F.2d at 1266.

amended returns is to invite abuse.[7] The relevant question, however, is not whether it would be wise for Congress to create incentives for filing amended returns after fraudulent returns were filed or to restrict the ability of the Commissioner to assess taxes at any time, but rather whether Congress, in fact, did so. We are limited to interpreting the statute before us. It is not our role to set tax policy.

Not only is the language of this section of the statute relating to fraudulent returns clear, but nothing in the structure of the Internal Revenue Code leads us to believe that Congress intended parties who filed fraudulent returns to be permitted to take advantage of the general three year statute of limitations. The willful filing of fraudulent returns with intent to evade tax is consistently treated as the most serious form of tax evasion. A person who commits such fraud subjects himself to major civil and criminal penalties. He cannot escape those penalties or eradicate the fraud merely by filing a non-fraudulent amended return.

The Commissioner has six years to assess deficiencies against taxpayers who omit more than 25 percent of their gross income from their original returns.[8] Amend-

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7. The appellees have pointed to no cases in which the Commissioner has used his power under section 6501(c)(1) to prosecute fraud "at any time" in an abusive way. As the government notes in its brief, there are no real incentives for it to delay bringing civil assessment actions and very powerful incentives for it to act as quickly as possible. Delays serve only to make it more difficult for the I.R.S. to carry its burden of proof in fraud cases. The Commissioner, recognizing the problems inherent in delay, specifically requires agents to keep investigations involving possible fraud as "current" as any other type of case, even though the agents theoretically are faced with no limits on when such actions could be brought. II Audit, CCH Internal Revenue Manual, §4565.51(3).

8. 26 U.S.C. §6501(e)(1)(A) states:

Substantial omission of items. Except as otherwise provided in subsection (c)—

ed returns have no effect on the six year period. *Houston v. Commissioner*, 38 T.C. 486 (1962); *Goldring v. Commissioner*, 20 T.C. 79 (1953). If, therefore, section 6501 were read as the taxpayers in these appeals urge us to do, we would create a situation in which persons who committed willful, deliberate fraud would be in a better position than those who, without an intent to commit fraud, had omitted more than 25 percent of their gross income from their original returns. There is no basis for concluding that in the single area of the statute of limitations Congress intended so to favor persons or corporations that have perpetrated tax fraud.

Moreover, the I.R.S. has advanced strong reasons for believing that a three year limitations period is not adequate to permit the Commissioner to meet his dual responsibility of proceeding both civilly and criminally. *Cf. United States v. LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). It has long been the policy of the I.R.S. to defer civil assessment and collection until the completion of criminal proceedings. *See, e.g.*, Policy Statement P-4-84, 1 Administration, CCH Internal Revenue Manual, ¶1218; IV Audit, CCH Internal Revenue Manual, ¶¶4565.32(2) and 4565.42. This policy, which the Fifth Circuit characterized as both "necessary and wise," *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), permits the I.R.S. to avoid the serious constitutional problems that could be created by simultaneous

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(1) Income taxes. In the case of any tax imposed by subtitle A —

(A) General rule. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

proceedings, problems which can limit, for example, the availability of the ordinary tools for investigating civil tax liability once the commitment is made to refer a case for criminal prosecution. *U.S. v. LaSalle National Bank*, *supra*.

It is, furthermore, simply not the case that once an amended return is filed, the Commissioner can easily discover the fraud in the original return. The I.R.S. faces a heavy burden of proof in fraud cases, and thorough investigation of such frauds is a time-consuming process. *Klemp v. Commissioner*, 77 T.C. 201, 212-213 (1981) (Parker, J. dissenting). When passing the Act, Congress certainly knew of I.R.S. procedures and of the problems involved in ferreting out fraud. There is nothing to indicate that Congress intended to imply a term, absent in the statute itself, that would force the Commissioner to decide to proceed with only civil or criminal remedies or to jeopardize both by going forward civilly and criminally at the same time.

IV.

As Learned Hand reminded us, "[t]here is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed." *F.D.I.C. v. Tremaire*, 133 F.2d 827, 830 (2d Cir. 1943). But the courts in their search for the true purpose of Congress should not lightly go beyond the plain language of the statutes they are supposed to be interpreting, and arrogate to themselves the power to divine in oracular fashion which among constitutionally permissible alternatives is the appropriate one.

The decision of the Tax Court in *Badaracco* and the judgment of the district court in *Delect* will be reversed, and these cases will be remanded for further proceedings consistent with this opinion.

HUNTER, *Circuit Judge, dissenting*:

1. The majority holds that the filing of a non-fraudulent amended return after the filing of a fraudulent original return does not start the running of the three year statute of limitations in I.R.C. §6501(a) (1976) for the assessment of tax. I respectfully dissent.

2. The underlying facts involved in these appeals are not in dispute. In both cases, taxpayers originally filed fraudulent tax returns with the Commissioner. They later filed amended returns covering the same taxable periods. The Commissioner concedes that the amended returns were non-fraudulent and that they contained all the information the law required in the original filings. Over six years after the filing of the amended returns, the Commissioner issued deficiency notices for taxes allegedly owed by the taxpayers. Taxpayers sought relief,[1] arguing that the Commissioner's actions were barred by I.R.C. §6501(a) (1976), which requires the Commissioner to initiate the assessment and collection of tax within three years of the filing of a return. The Commissioner argued that his action was timely under section 6501(c)(1), which allows the Commissioner to initiate the assessment and collection of taxes at any time after the filing of a fraudulent return. I.R.C. §6501(c)(1) (1976). Applying the reasoning of *Doucll v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), and *Klemp v. Commissioner*, 77 T.C. 201 (1981), *appeal docketed*, No. 81-7744 (9th Cir. November 5, 1981), the courts below found for the taxpayers. These appeals followed.

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1. In *Badaracco* the taxpayer filed a petition with the tax court for a redetermination of the deficiency under I.R.C. §6213(a) (1976 & Supp. IV 1980). In *Delect* the taxpayer paid the tax and then sought a refund in the District Court for the District of New Jersey pursuant to I.R.C. §7422 (1976 & Supp. IV 1980) and 28 U.S.C. §1346(a)(1) (1976).

3. Section 6501 lays out the basic time limitations on the assessment and collection of taxes by the Commissioner. Section 6501(a) provides in relevant part:

> (a) **General rule.** — Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

I.R.C. §6501(a) (1976). Section 6501(c)(1) provides:

> (1) **False return.** — In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

I.R.C. §6501(c)(1) (1976). Interpreting these two provisions, the majority finds section 6501(c)(1) to be "clear on its face" and holds it to be a complete exception to section 6501(a), even when the taxpayer files a subsequent, non-fraudulent amended return.

4. While recognizing that "[t]he starting point in every case involving construction of a statute is the language itself," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring), the Court has recently admonished that "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. . . . This is because the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981), *quoting Boston Sand Co. v. United*

States, 278 U.S. 41, 48 (1928).[2] In this case sufficient persuasive evidence exists to lead me to a different conclusion than the majority about the proper interpretation of section 6501. Because amended returns are not an explicit part of the statutory scheme, because a reasonable alternative reading of the statutory scheme is apparent, and because the majority's holding leads to distorted results, I am unable to accept the majority's reading of the statute's "plain meaning."

5. First, although section 6501(c)(1) might be "clear on its face" concerning the Commissioner's statutory authority to act when a false or fraudulent return is *first* filed, it is not "clear" on the issue presented here, the effect of a *subsequent* filing of a non-fraudulent amended return. The majority itself acknowledges, majority op. at ____ n.4, that Congress has not provided for amended returns under the statute and that the Commissioner's treatment of them is a matter solely within his discretion. *Koch v. Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977); *Miskovsky v. United States*, 414 F.2d 954, 955-56 (3d Cir. 1969); *Lion Associates, Inc. v. United States*, 515 F. Supp. 550 (E.D. Pa. 1981).[3] They

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2. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

3. Taxpayers point to one provision which mentions "amendments" to returns. I.R.C. §6213(g)(1) (1976 & Supp. IV 1980) defines "return" for the purposes of §6213 as "any return, statement, schedule, or list, and any amendment or supplement thereto . . . ." The legislative history indicates that this definition was in-

are a creation of the Internal Revenue Service and not of Congress. It is thus difficult to understand how their effect on the statute of limitations can be discerned solely from the language of the statute when Congress made no provision for amended returns within the statutory scheme.

6. Second, *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), offers a reasonable alternative interpretation of section 6501. *Accord Britton v. United States*, 532 F. Supp. 275 (D. Vt. 1981), *aff'd without opinion*, No. 82-6246 (2d Cir. April 15, 1982); *Klemp v. Commissioner*, 77 T.C. 201 (1981), appeal docketed, No. 81-7744 (9th Cir. November 5, 1981).[4] In *Dowell*, the court recognized that the fraudulent original return is not a "return" for the purposes of section 6501(a). The court cited *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), in which the Supreme Court held that the statute of limitations began to run against deficiency assessments upon the filing of a first return if the first return is proper. The Court stated that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such . . . and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180. Applying this princi-

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NOTE. — (*Continued*)

cluded to insure that the Commissioner reviewed all supporting schedules for "mathematical errors" before assessing deficiencies through summary proceedings. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 289-93 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 375-78 (1976). It does not indicate that Congress explicitly included amended returns within the statutory scheme.

4. *See Espinoza v. Commissioner*, 78 T.C. 412 (1982); *Kramer v. Commissioner*, 44 T.C.M. (CCH) 42 (1982); *Elliott Liroff v. Commissioner*, 44 T.C.M. (CCH) 43 (1982); *Degel v. Commissioner*, 44 T.C.M. (CCH) 45 (1982); *Richard B. Liroff v. Commissioner*, 44 T.C.M. (CCH) 47 (1982); *Nesmith v. Commissioner*, 42 T.C.M. (CCH) 1269 (1981), *appeal docketed*, No. 82-4162 (5th Cir. April 29, 1982) (all following *Klemp*).

ple to the instant situation, the *Dowell* court reasoned that a fraudulent return is not an honest and genuine effort to satisfy the law and thus does not start the running of any statutory limitation period. *Dowell*, 614 F.2d at 1265-66; *cf. Kaltreider Construction Co. v. United States*, 303 F.2d 366, 368 (3d Cir.), *cert. denied*, 371 U.S. 877 (1962) (the first return must be complete and meet the statutory requirements; the statute of limitations will begin to run only upon the filing of a proper return) (dicta). Section 6501(c)(1) does apply whenever an inadequate return is filed, not as a statute of limitations, but rather as a provision allowing the government to institute a suit at any time.[5] When a valid return is filed, even in the form of an amended return to a previously filed fraudulent return, the limitation period of section 6501(a) begins to run.

7. Third, the *Dowell* court's statutory reading of section 6501 "balances the policy of repose to the taxpayer with the purpose of providing the Commissioner of Internal Revenue adequate time to assess taxes and deficiencies." *Britton*, 532 F. Supp. at 278. While a fraudulent return may put the Commissioner at a special disadvantage in detecting errors, the filing of an amended return removes the disadvantage by providing the Commissioner with all the information required by law. The general rule, therefore, should govern. *Dowell*, 614 F.2d at 1265.[6] That interpretation also avoids the distorted re-

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5. As the Tenth Circuit recognized in *Dowell*, §6501(c) "represents the antithesis of a limitation period." 614 F.2d at 1265-66.

6. That reading is also consistent with the language of §6501(a) that tax must be assessed within three years after a return is filed "whether or not such return was filed on or after the date prescribed." I.R.C. §6501(a). When no return is filed, the Commissioner is able to act "at any time" under I.R.C. §6501(c)(3). If a return is later filed, however, the Commissioner then has all the necessary information to assess what tax is due, and the general three year period applies. *Dowell*, 614 F.2d at 1265; *Bennett v. Commissioner*, 30 T.C. 114, 124 (1958).

sult reached by the majority. Under the majority's holding, once a fraudulent return is filed, the threat of future assessment of deficiencies will hang in perpetuity like the Sword of Damocles over the head of the taxpayer, despite his efforts to set the record straight.[7]

8. In reaching my conclusion, I do not purport to set tax policy, rather merely to interpret the tax code in light of congressional purpose. *See Rose v. Lundy*, ____ U.S. ____, ____ (1982) (when Congress never thought of the problem, courts must examine a statute's underlying purposes to determine its proper scope); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."). My interpretation of section 6501 reflects the factual reality that the Commissioner has made amended returns an integral part of the administrative scheme,[8] even though Congress did not make it an explicit part of the statutory scheme. The differing conclusions reached by the majority and the tenth circuit indicate that Congress' intent under this provision is far from clear and that perhaps section 6501 is a proper area for further legislative scrutiny. I am unable nonetheless to join the majority's hold-

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7. The application of the three year statute of limitations will not allow a taxpayer who previously filed a fraudulent return to "escape [the] penalties or erase the fraud merely by filing a non-fraudulent amended return." Majority op. at ____. The taxpayer is still subject to civil and criminal sanctions as long as the Commissioner acts within three years.

8. The Commissioner's regulations provide for the use of amended returns by the Internal Revenue Service. *See, e.g.*, 26 C.F.R. §§301.6211-1(a), .6402-3(a)(5) (1982). When the I.R.S. has accepted amended returns, as in this case, the courts have given them effect. *E.g., United States v. Samara*, 643 F.2d 701, 704 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981); *Rooka alter v. Mayer*, 345 F.2d 476, 480 (8th Cir. 1965).

ing that section 6501, as presently written, does not provide for the application of a three year statute of limitations in this case."

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—Judgment of the Third Circuit Court of Appeals, Dated November 29, 1982.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-3033

ERNEST BADARACCO, Sr., and ROSE BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE

(T.C. No. Docket No. 1700-78)

ERNEST BADARACCO, Jr. and BARBARA BADARACCO

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellant in No. 81-3033

(T.C. Nos 1700-78 & 1701-78)

No. 82-5171

DELEET MERCHANDISING CORP.

vs.

THE UNITED STATES OF AMERICA,

Appellant in No. 82-5171

(D.C. Civ. No. 80-00026)

ON APPEAL FROM THE UNITED STATES TAX COURT and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and BECKER, *Circuit Judges*

JUDGMENT

These causes came to be heard on the records from the United States Tax Court and the United States District Court for the District of New Jersey and were argued by counsel September 16, 1982.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court entered August 11, 1981, and the judgment of the said District Court, entered December 23, 1981, be and the same are hereby reversed and the causes remanded to the said Courts for further proceedings in accordance with the opinion of this Court.

Attest:

SALLY INVOS
Clerk

November 29, 1982

APPENDIX C—Decision of the Third Circuit Court of Appeals Denying Appellee's Petition for Rehearing.

UNITED STATED COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-5171

DELEET MERCHANDISING CORPORATION

v.

UNITED STATES OF AMERICA

(C.A. No. 80-00026)

SUR PETITION FOR REHEARING

EN BANC

Present:

SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEISS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

ALAN B. ADAMS
Circuit Judge

Dated: Dec 23 1982

APPENDIX D—Opinion of the United States District Court for the District of New Jersey Granting Plaintiff's Motion for Summary Judgment.

Not for Publication

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DELEET MERCHANDISING CORPORATION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 80-0026

Appearances:

Fredericks & Messinger, By: Barry I. Fredericks, Esq., 39 Hudson Street, Hackensack, New Jersey 07601; Goldschmidt, Fredericks & Oshatz, By: Edward Sussman, Esq., 655 Madison Avenue, New York, New York 10021 (Attorneys for Plaintiff); Stephen T. Lyons, Esq., Trial Attorney, Tax Division, Department of Justice, Washington, DC 20530 (Attorney for Defendant)

FISHER, Chief Judge.

This is a motion for summary judgment brought by plaintiff, Deleet Merchandising Corporation, against defendant, the United States of America. For reasons stated herein, the motion is granted.

Plaintiff timely filed its 1967 and 1968 corporate income tax returns with the Internal Revenue Service and paid the tax shown to be due thereon. In August 1973, plaintiff filed amended income tax returns for 1967 and 1968 in which it requested a refund for 1967 and paid an additional tax due for 1968. In December 1979, the I.R.S. issued a statutory notice of deficiency to plainttff stating that the claim for a refund for 1967 was disallowed and that there was a further tax deficiency for both years. Plaintiff then paid the asserted deficiencies and penalties and, in May 1980, filed a claim for a refund for those amounts on the ground that its amended returns were correct as filed.

Plaintiff also filed this action for a refund of the asserted deficiencies on the grounds that the I.R.S.' determination was improper, illegal and erroneous. Plaintiff now brings this motion for summary judgment pursuant to Fed. R. Civ. P. 56 alleging that the defendant is time-barred under 26 U.S.C. §6501 which requires any tax to be assessed by the I.R.S. within three years after a return is filed. Defendant opposes the motion on the ground that this court lacks jurisdiction to hear the §6501 statute-of-limitations issue.

Plaintiff alleged jurisdiction in its complaint under 28 U.S.C. §1346(a)(1) which grants the district courts original jurisdiction of any civil action against the United States for the recovery of any tax or penalty alleged to have been erroneously or illegally assessed or collected. However, that statute is supplemented by 26 U.S.C. §7422(a) which requires a taxpayer to file an administrative claim for a refund with the I.R.S. before a suit can be maintained

in a district court. Treasury regulation 26 C.F.R. §301.6402-2(b) further requires a claim for a refund to set forth in detail each ground upon which the refund is claimed. Thus, "[a] prerequisite of jurisdiction of the district court conferred by 28 U.S.C. §1346(a)(1) is the filing of a claim for refund so that the Internal Revenue Service may first pass upon the validity of it. 26 U.S.C. §7422(a)." *Miniature Vehicle Leasing Corp. v. United States*, 266 F. Supp. 697, 702 (D.N.J. 1967). In addition, "[t]he law is well settled that a plaintiff in a tax refund suit may only recover upon the grounds specifically set forth in the [administrative] refund claim." *Spaeder v. United States*, 478 F. Supp. 73, 80 (W.D. Pa. 1978).

Plaintiff in this case complied with the section 7422(a) requirement by filing an administrative claim for a refund; however, that claim merely alleged that plaintiff's amended tax returns for the years in question were correct as filed. Thus, the defendant bases its jurisdictional argument on the ground that plaintiff did not set forth the section 6501 statute-of-limitations issue in the claim for a refund. However, plaintiff has cured the jurisdictional defect by recently filing an amended claim for a refund with the I.R.S., which includes the section 6501 issue. This amended claim was timely filed. 26 U.S.C. §6511(a). Thus, defendant's jurisdictional argument is moot.

Plaintiff now seeks a summary judgment alleging that there are no genuine issues of material fact and that defendant is precluded from assessing the tax deficiency in question because the assessment was untimely. It is provided in 26 U.S.C. §6501(a) that

> [e]xcept as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) . . . .

However, 26 U.S.C. §6501(c)(1) states that

> [i]n the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Plaintiff now argues that its non-fraudulent amended returns, filed in 1973, triggered the 3-year statute-of-limitations period in section 6501(a). Defendant argues that plaintiff's original returns were fraudulent, thus allowing the I.R.S. to assess a tax "at any time" under section 6501(c)(1). Assuming for purposes of this motion that the original returns were indeed fraudulent, the issue is whether an original false or fraudulent return with the intent to evade tax allows the I.R.S. to assess the tax at any time regardless of any non-fraudulent amended return that is later filed.

This issue was decided in favor of the taxpayer in *Dowell v. C.I.R.*, 614 F.2d 1263 (10th Cir. 1980). In that case, the court characterized section 6501(c)(1) as "the antithesis of a limitations concept." 614 F.2d at 1265-1266. The filing of a fraudulent return does not start any limitations period running; rather, it simply allows the I.R.S. to assess the tax due at any time. The court noted that "[t]he purpose of §6501(c)(1) is to provide the Government time to unearth information the taxpayer did not furnish and to file an assessment." 614 F.2d at 1266. On the other hand, once the I.R.S. has the information from a non-fraudulent amended return, " 'there can be no policy in favor of permitting assessment thereafter at any time without limitation.' " *Id.* (citation omitted). Thus, the filing of a non-fraudulent amended return will start the running of the 3-year statute of limitations in section 6501(a). This reasoning was followed in *Klemp v. Commissioner*, 77

T.C. ____, No. 17 (Aug. 5, 1981). See also *Badaracco v. Commissioner*, 42 T.C.M. 573 (1981).

Fed. R. Civ. P. 56(c) provides that summary judgment should be granted if "there is no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." My examination of the pleadings, briefs and affidavits reveals that there are no genuine issues of material fact. Whether plaintiff's original returns were fraudulent is not a material issue of fact since it has no bearing on the outcome. In 1973 plaintiff filed non-fraudulent amended income tax returns for the 1967 and 1968 tax years. The 3-year statute of limitations in section 6501(a) began to run at this time. Thus, the I.R.S. assessment of a tax deficiency and penalties in 1979 was untimely. Accordingly, plaintiff's motion for summary judgment is granted. The order previously submitted by plaintiff is filed with this opinion.

December 22, 1981.

APPENDIX E—Order of the District Court for Summary Judgment.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

DELEET MERCHANDISING CORP.,

Plaintiff,

against

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action N0. 80-26

Judge Clarkson Fisher

Plaintiff, having moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and said motion having regularly come on to be heard on the 14th day of December, 1981, and the Court having found that plaintiff is entitled to judgment as a matter of law, it is

ORDERED that plaintiff's motion is in all respects granted and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff and against defendant in the sum of One Hundred Fourteen Thousand One Hundred Ninety-Three Dollars and Eighty-Three Cents ($114,193.83) together with interest and costs as provided by law.

12/22/81

CLARKSON FISHER
U.S.D.J.

APPENDIX F—Order Withdrawing Defendant's Motion to Vacate the Court's Order in the Case of *Liroff v. Commissioner.*

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

ELLIOT LIROFF and EVELYN LIROFF,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 3219-80

ORDER

On January 20, 1983, respondent filed a motion to vacate the Court's order dated August 3, 1982 granting petitioner's motion for partial summary judgment in the above-entitled case. On February 1, 1983, respondent informally requested that this motion be withdrawn. Upon due consideration, it is

ORDERED that respondent's motion to vacate the Court's order dated August 3, 1982 granting petitioner's motion for partial summary judgment is hereby withdrawn.

DATED: February 4, 1983
Washington, D.C.

PERRY SHIELDS
Judge